IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 944 15

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner*,

v.

FELT & TARRANT MFG. CO.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Attorney for Respondent.

May, 1939.

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BRIEF IN OPPOSITION.

OPINIONS BELOW.

The memorandum opinion of the Court of Appeals is reported in 279 N. Y. 678, 18 N. E. (2d) 311, and the opinion of the Appellate Division is reported in 254 App. Div. 246, 4 N. Y. S. (2d) 615.

JURISDICTION.

The jurisdiction of this Court is involved under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Are sales of goods manufactured in Chicago, Illinois, by an Illinois corporation, which is not authorized to do business in the State of New York, subject to the New York City "Sales Tax" where the order for the goods must be and is approved in Chicago, the goods are appropriated to the order in Chicago, and are then shipped in interstate commerce to the customer in New York City?

STATUTES INVOLVED.

Laws of the State of New York, Chapter 873 of the Laws of 1934, as amended. (Cahill's Consolidated Laws of New York 1931-1935 Supplement, page 798).

New York City "Sales Tax", Local Law No. 20 (published as No. 21, p. 143) as amended by Local Law No. 24 (published as No. 25, p. 164) of the Laws of 1934 of the city of New York.

New York City "Personal Property Tax", Local Law No. 25 of 1934, No. 31 of 1935, No. 28 of 1936, No. 21 of 1937, No. 28 of 1938 of the city of New York.

Pertinent excerpts are found in the "Appendix" hereto, A, B, and C.

STATEMENT.

This case involves a New York City "Sales Tax" illegally collected from an Illinois manufacturer, not qualified to do business in the State of New York, on sales in interstate commerce.

The taxpayer, Felt & Tarrant Mfg. Co. is a corporation organized under the laws of the State of Illinois. Its factory and principal office and place of business is located in Chicago, Illinois. It is engaged in the business of manufacturing and selling adding and calculating machines known as "Comptometers". (R. 3, 25, 32.)

The taxpayer is not authorized or licensed to do business in New York State. (R. 3-4, 31, 60.)

All manufacturing is done at Chicago, Illinois (R. 32). The Company has *no* manufacturing plant in the State of New York (R. 25); *no* warehouse or other depository in the State of New York (R. 28) and *no* stock of machines on hand in New York City from which sales are made. (R. 28, 32, 45, 46.)

The Company employs a principal and sub-solicitors to solicit orders for comptometers from customers in the City of New York (R. 33). Solicitors operate under a written agreement with the Company (Exhibit 2, R. 54-58). Under the terms of the agreement the duties of solicitors are restricted *solely* to the solicitation of orders. (Ex. 2, par. 1, R. 56-57.) Solicitors have no power to accept an order (R. 39) or to collect money for an order. (Ex. 2, par. 5, R. 57.)

The Company uses a standard form of order blank (R. 26-27); (Exhibit 1, R. 53.) All orders must be addressed to "Felt & Tarrant Mfg. Co., Chicago, Illinois" (R. 37, Exhibit 1, R. 53) and on the face of the order blank is printed: "All orders subject to the acceptance of an officer of the Company in Chicago". (R. 53.) All orders received must be approved by an officer of the Company, at Chicago, Illinois, and an order cannot be filled without such approval. (R. 27-28, 39, 40.)

After approval the order goes to the Billing Department, at Chicago, where an order is made out on the Shipping Department, at Chicago, Illinois, for the shipment of a comptometer. (R. 27, 29, 30, Exhibit A, R. 58.) A comptometer is then allocated, by Serial Number, to the order by the Shipping Department, at Chicago, and the individual Serial Number of the Comptometer, so appropriated to the order, is inserted in the upper right-hand corner of the shipping order. (R. 27, 30, Exhibit A, R. 58.) The complete, assembled, machine is then packed in an *individual carton* for shipment to the purchaser. (R. 39.) The shipping order, at Chicago, is then turned over to the Billing Department, at Chicago, where an "Invoice" is made out at Chicago, for the specific "comptometer" by Serial Number of

the machine appropriated to the individual customers's order. (R. 30, Exhibit B, R. 59.)

The invoice is mailed from Chicago to the customer showing the Serial Number of the specific Comptometer shipped. (R. 30, Exhibit B, R. 59.) The Invoice states on its face: "Make All Checks Payable to Company—Remit Directly to Chicago". (R. 59.)

All remittances are sent direct to Chicago and all collections are made at Chicago, Illinois. (R. 30.) *No* billings are sent from and *no* collections are made in New York City. (R. 30.)

The comptometers are shipped in interstate commerce by common carrier, express, freight or motor service to the customer (R. 28, 41) packed in individual separate cartons. (R. 39.)

No Comptometers at the New York office are available for sale. (R. 28, 32, 38, 40, 45, 46.) The Comptometers at the New York office are used only for repair loans and demonstrations (R. 37, 40, 47, 48). These machines are *never* sold to customers in New York City. (R. 32, 37-38, 45, 46, 47.)

Comptometer Company, a Delaware Corporation, and a subsidiary of taxpayer, is authorized to do business in the State of New York. (R. 60.)

Servicing of the comptometers under the one year guarantee and repairs to machines after the guarantee period had expired, were until August 31, 1935, performed by Felt & Tarrant Company, and after that time they were performed by Comptometer Company. (R. 33-34, p. 14c, Doc. No. 3.)

Sales tax returns have been filed and New York City "Sales Taxes" have been paid on all charges for repair work and services to Comptometers performed in New York City and for all local sales of parts and local rental of machines during the taxable period in suit. (R. 40-41, 51.)

The Comptroller of the City of New York assessed additional "Sales Taxes" and interest of $3,122.53 against Felt

& Tarrant Company on alleged taxable sales (R. 72-73); the assessment was involuntarily paid under protest and duress (R. 8-9); application was filed for a refund of the taxes and interest paid (R. 10-11); and refund was denied. (R. 74-75.)

An order of certiorari was granted by the Supreme Court, New York County, to review the determination of the Comptroller. (R. 2-3.)

The Appellate Division, First Judicial Department, sustained the order of certiorari and annulled the determination of the Comptroller in the sum of $2,973.98, the taxpayer having admitted that an additional tax of $148.55 was due for rental of machines to the Comptometer Company and on sales of parts. (R. 76-80.)

The Court of Appeals affirmed the Appellate Division on the authority of its prior decision in *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208. (R. 90.)

The Comptroller has filed a petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT.

This is a "Sales Tax" case in which this Court has already denied petitions for certiorari in New York cases involving the same issues and facts.

The New York City "Sales Tax" is restricted by the Enabling Act to "Local" sales. Sales in interstate commerce are expressly exempted. Exterritorial sales are not subject to the tax.

Under the New York City "Sales Tax" and "Personal Property Tax" the City can lawfully collect these taxes from the purchaser instead of unlawfully collecting them from the Illinois manufacturer.

There is no discrimination against New York manufacturers or merchants by invalidating these taxes because the articles are patented and sold exclusively by the Illinois Company. They cannot be and are not sold by any other person in New York City or in the United States.

Taxation of these sales by the City of New York is a burden on interstate commerce under the decisions of this Court.

A "Sales Tax" and a "Use Tax" differ fundamentally. There is no conflict between the decisions of the courts below and the decisions of this Court in the "Use", "Privilege", "Excise", "Sales", "Personal Property" and "Gross Receipts" tax cases.

There is no conflict in the State Court decisions.

The petition should be denied.

ARGUMENT.

I. Petitions for Certiorari Were Denied by this Court in Similar New York Cases.

The Court of Appeals of New York has construed the Local Laws, passed by the City of New York, and has held that, under the facts of this case, the "Sales Tax" does *not* apply to the sales made by the Respondent.

This Court has already denied petitions for certiorari (303 U. S. 656) in cases involving the same question and substantially the same facts in *McGoldrick, Comptroller* v. *National Cash Register Co.*, 303 U. S. 656 (276 N. Y. 208, sub. nom., Matter of National Cash Register Co. v. Taylor, Comptroller), and *McGoldrick, Comptroller* v. *West Publishing Co.*, 303 U. S. 656 (276 N. Y. 535, sub. nom., Matter of West Publishing Co. v. Taylor, Comptroller.

The Court of Appeals decided the case at bar on the authority of *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, certiorari denied, 303 U. S. 656. So did the Appellate Division of the Supreme Court. Those courts held, on the particular facts involved, that the tax herein was erroneously collected from the manufacturer.

The Courts below followed the principles established by the decisions of this Court in *Crew Levick* v. *Pennsylvania*, 245 U. S. 292; *Chevey Bros. Co.* v. *Massachusetts*, 246 U. S. 147; *Stewart* v. *Michigan*, 232 U. S. 665; *Dozier* v. *Alabama*,

218 U. S. 124; *Brennan* v. *Titusville*, 153 U. S. 289; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Helson* v. *Kentucky*, 279 U. S. 245; *State Tax Commission* v. *Gas Co.*, 284 U. S. 41; *Cooney* v. *Mountain States T. & T. Co.*, 294 U. S. 384.

II. This Case Involves a "Sales Tax" Imposed Upon and Collected from a Manufacturer of Goods Shipped in Interstate Commerce and Therefore Violates the Commerce Clause of the Constitution.

The enabling Act, Chap. 873 of the Laws of New York of 1934 (Appendix A), restricted the power of the City to the taxation of purely "local" sales.

Section 1 provides:

> "A tax imposed hereunder shall have application only within the territorial limits of any such city."
> * * *

And it provides:

> "This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, *notwithstanding that some act be necessarily performed with respect to such transaction within such limits*". (Italics ours)

The City "Sales Tax" Law expressly exempts sales in interstate commerce (Appendix B).

Section 2 provides:

> " * * * receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax shall not be subject to tax hereunder".

New York City may not, under these laws, tax exterritorial sales effected outside of the territorial limits of

the city. The courts below held the sales in the case at bar were not local and were not subject to the tax.

In the case at bar the sales were consummated in Chicago, Illinois, the specific goods were appropriated to the sales in Chicago, and the goods were then shipped in interstate commerce. The City cannot exert its taxing powers extraterritorially or tax sales in interstate commerce.

As was said by the Court of Appeals in the case of *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, at pp. 213-214:

> "* * * The rule formulated and applied in these cases brings within the taxing power of the State the products of the petitioner held in stock in New York for sale. A tax imposed by the State on the sale of goods produced here and goods imported from other States is valid. However, the goods delivered under a 'special order' were not within the State when the order was given. The contract of sale did not become effective until the order given in New York was accepted in Ohio; the goods sold were manufactured in Ohio; they were appropriated to the contract of manufacture or sale in Ohio; they were never held here at the pleasure of the seller for disposal or use; they were sent to the office here of the seller only for delivery to the buyer and as a convenient step in the transportation from the factory of the seller outside the State to the buyer here."
>
> "* * * Here, on the contrary, the contract made outside the State called for the delivery of goods which were manufactured outside of the State and which could not be procured within the State."

III. This Case Involves no Question of General Law, Nor is the Question One of Substance or Importance.

"Sales Tax" cases raise factual questions. This case turns upon the application of a local City "Sales Tax" law to the particular facts of this case, namely, was there a local, taxable sale.

Every "Sales Tax" case depends upon its particular facts, the decision in one case is not controlling in another case where the facts differ.

No important question of general law is raised nor is the question one of substance, general importance or public interest.

Compare, *Bacon & Sons* v. *Martin*, 305 U. S. 380, 381, where this Court dismissed the appeal for want of a substantial federal question. Compare, *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184, where the Court of Appeals of New York held, under different facts and circumstances, that the New York City Sales Tax was applicable and the sales made were taxable.

IV. The New York City "Sales Tax" and "Personal Property Tax" Permit the City to Lawfully Collect the Taxes in the Case at Bar from the Purchaser as Opposed to an Unlawful Collection from the Manufacturer.

The case at bar relates entirely to "Sales Taxes" collected from the manufacturer on interstate shipments.

Under the New York City "Sales Tax" law (Appendix B), the Comptroller may, and actually does, collect the "Sales Tax" from purchasers where the sales tax has not been paid upon the article. The Comptroller has, in the case at bar, collected the sales tax upon Comptometers from customers of the Respondent. See Document No. 13 (R. 71-72) making claim for such a credit and Document No. 14 (R. 72-73) allowing the claim made.

Furthermore, under the New York City "Personal Property Tax" law (Appendix C), the Comptroller may collect a tax, in the same amount as the sales tax, from persons owning or using in the City of New York articles upon which the "Sales Tax" has not been paid.

The latter law supplements or complements the New York City "Sales Tax" law in the same way that the Cali-

fornia "Use Tax" law supplements the California "Sales Tax" law discussed *infra* under heading VIII.

Under the above New York laws the Comptroller has ample authority to legally collect from the purchasers of Comptometers any taxes due without the loss of any revenue to the city. But the Comptroller, instead of using the laws at his command, insists upon illegally collecting "Sales Taxes" from the Illinois manufacturer and in so doing deliberately imposes a burden on interstate commerce. That he need not and cannot do.

The Local New York Laws are designed to avoid any discrimination when properly administered.

V. No Discrimination Against New York Manufacturers and Merchants Results from Invalidating the Tax Collection in the Case at Bar.

"Comptometers" are computing machines specially manufactured and sold exclusively by the Respondent under its own patents. Local New York manufacturers do not and cannot manufacture these machines. Local merchants cannot and do not sell these machines. All sales are made by the Respondent at and from Chicago, Illinois. To hold that these "Sales Taxes" were erroneously collected does not discriminate against any local New York City merchant or manufacturer or in fact any manufacturer in the United States. The unjust discrimination theory, therefore, does not apply to the facts in the instant case as it might where a general commodity is sold in competition with local trade.

The Comptroller himself can avoid any unjust discrimination by collecting these "Sales Taxes" from Respondent's customers in New York City.

VI. Taxation of the Sales in the Case at Bar is a Burden on Interstate Commerce Under the Decisions of this Court.

Interstate commerce includes the *buying and selling* of commodities for shipment across a state line. *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n*, 273 U. S. 52, 64; *Sonneborn* v. *Cureton*, 262 U. S. 506.

The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. *Stewart* v. *Michigan*, 232 U. S. 665.

In *Ware & Leland* v. *Mobile County*, 209 U. S. 405, this Court said at page 412:

> "These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a State by a person employed to solicit for them in another State, the goods to be shipped from the one State to the other, is interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; similar cases are *Rearick* v. *Pennsylvania*, 203 U. S. 507, and *Caldwell* v. *North Carolina*, 187 U. S. 622. In these cases goods in a foreign State are sold upon orders for the purpose of bringing them to the State which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject-matter of the dealing is goods to be shipped in interstate commerce; to be carried between States and delivered from vendor to purchaser by means of interstate carriage."

In *Real Silk Mills* v. *Portland*, 268 U. S. 325, this Court said at page 335:

> "Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the Commerce Clause. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; *Brennan* v. *Titusville*, 153 U. S. 289; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Texas Transport Co.* v. *New Orleans*, 264 U. S. 150; *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203.

> "The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.' * * *"

And recently in *National Labor Relations Board* v. *Fainblatt*, 59 S. Ct. 668, this Court said at page 671:

> "Transportation alone across state lines is interstate commerce."

In *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, this Court said at page 439:

> "* * * If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because of interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." [Citing cases.]

Not only the "risk" of double taxation but double taxation in fact can result from the taxation of these sales by the City of New York.

The State of Illinois has a "Retailer's Occupational Tax", enacted June 28, 1933, and still in effect. Smith-Hurd Stats., p. 2767; Cahill's Stats., p. 2389; Ill. State Bar Stats. (1935), p. 2705. This is "An Act in relation to a tax upon persons engaged in the business of selling taxable personal property to purchasers for use or consumption." The tax is based upon gross sales. If Illinois can tax the sales in question and New York City can also tax them, there is double taxation in fact. Furthermore, there is no prohibition upon the State of Illinois or the City of Chicago from enacting a "Sales Tax" on these very sales. Again, the Respondent can be subjected to a personal property tax

on the machines which it has on hand in Chicago for delivery to customers outside of the State.

If New York City can tax the company for sales to New York customers then every city in the United States and every State may tax such sales when made to its inhabitants. That situation would immediately raise tariff walls around each city and state of the Union which would be destructive not only of interstate commerce but of the very protection which the Commerce Clause was designed to preserve.

Other burdens on interstate commerce in the case at bar consist of the compulsion, under the sales tax law, of the Comptroller of New York City forcing an Illinois corporation to act as a collecting agency for the city; the compulsion of forcing an Illinois corporation to file returns and reports with the City of New York; and the collection by the City of New York from an Illinois company of "Sales Taxes" which it can legally collect from the local New York purchasers in New York City.

The City of New York sent auditors to the City of Chicago to examine the Respondent's books and records. (R. 62-63) If the City of New York can do this, then every city in the United States which has a sales tax can send its auditors to the company's offices with the result that Respondent's offices would be overrun by investigators, auditors, checkers and others, to the utter disruption of its business.

When the City of New York compels an Illinois corporation, which is not authorized to do business in New York, to act as a collecting agency for the City, compels it to file returns, to make reports, etc., the City is attempting to exercise its sovereign powers beyond its jurisdiction. That it cannot do without burdening interstate commerce.

VII. A "Sales Tax" and a "Use Tax" Differ Fundamentally.

A "Sales Tax" applies only to a local sale. A "Use Tax", as the name implies, is a tax upon the privilege of owning, using, consuming or enjoying the possession of property and applies to goods, in the hands of the purchaser, owner

or user, whether or not they have been imported from a foreign state or country. In the instant case the "Use Tax" applies to the *customers* of the Respondent and *not* to the Respondent who is the manufacturer. In the case at bar the city is taxing the Illinois manufacturer for "Sales Taxes" and not the New York purchaser for "Use Taxes".

The case at bar does *not* involve a New York City *purchaser-consumer* but it *does* involved an Illinois *manufacturer-seller*. The distinction is obvious.

"Sales Tax" cases and "Use Tax" cases are further discussed *infra* under headings VIII and IX.

VIII. The Decisions of the Court Below Do Not Conflict With the "Use" or "Privilege" Tax Decisions of this Court.

The decisions of this Court which petitioner urges as conflicting with the decisions below are readily distinguishable. They involved "license" or "privilege" taxes for doing a "local" business or "use" taxes for the "local" employment or enjoyment of personal property. These taxes were sustained because of the "local", intrastate nature of the activity engaged in or because the articles were in "local" use. The taxable event was the local use or possession as distinguished from a tax on the sales of goods in interstate commerce.

(a) The "Use" tax cases.

The recent cases of *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 305 U. S. ...., 59 Sup. Ct. 376; *Southern Pacific Co.* v. *Gallagher*, 305 U. S. ...., 59 Sup. Ct. 389; and *Pacific T. & T. Co.* v. *Gallagher*, 305 U. S. ...., 59 Sup. Ct. 396, all involved the California "Use Tax"—*not* the California "Sales Tax". This Court held that the "local" use and enjoyment of articles imported from another State was taxable and did not burden interstate commerce.

Those decisions would be applicable where a customer of the Respondent sued to recover the New York City

"Sales Tax" paid by him on a "comptometer" upon which the sales tax had not been paid or to recover the New York City "Personal Property Tax" paid for possession and use of an article upon which the sales tax had not been paid. Otherwise the cases bear no analogy.

Henneford v. *Silas Mason Co.*, 300 U. S. 577, involved a "use" or "excise" tax on the privilege of using articles imported in interstate commerce which had become part of the common mass of property at rest in the State. It was a tax upon the "local" privilege of "local" use.

(b) The "Privilege", "Excise" and "Use" tax cases.

Coverdale v. *Pipe Line Co.*, 303 U. S. 604, involved a "privilege" tax on the "local" operation of machines for producing mechanical power. The tax was measured by the horsepower capacity of the machine used. The tax was laid on a "local" business and a purely local "use".

Nashville C. & St. L. Ry. Co. v. *Wallace*, 288 U. S. 249, involved a "privilege" or "excise" tax on the withdrawal for use of gasoline "locally" stored. The same was true in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, and *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, the latter tax being characterized as a "license fee", an "excise", upon the "local use" of motor fuel in the State.

And *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249, involved a "license" or "use" tax on the withdrawal of gasoline "locally" stored within the State.

Bacon & Sons v. *Martin*, 305 U. S. 380, involved an "excise" tax based upon the "use" of cosmetics locally within the State after importation.

Ware & Leland v. *Mobile County*, 209 U. S. 405, involved a "license tax" on persons engaged in buying and selling cotton futures and this Court held that the business was "local" and subject to tax. (But see the distinction made on page 412 as to orders taken for the sale of goods to be shipped from another State.) The same principles

controlled in *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, because of the "local" business done and the "local" nature of the "transactions".

Postal Tel.-Cable Co. v. *Richmond*, 249 U. S. 252, involved a "license tax" on the "local" business done within the City for the "privilege of doing business" therein.

The overzealous attempt of the petitioner to bring this case within the principles of the "storage" and "use" cases above must fail; *First*, because the statements on pages 5 and 10 of the petition for certiorari that the Respondent has "extensive storage facilities in New York City" is not a fact supported by the record, and, *Second*, because this is not a storage, withdrawal, or use tax case but a "Sales Tax" case in which the taxing power of the City is limited to a "local" sale.

The record shows that the Respondent did not have extensive storage facilities in New York City used for the storage of machines for sale (R. 28, 32, 38, 40, 45, 46) and the only machines stored were used for repair loans and rentals (R. 37, 40, 47, 48). The machines used for repair loans and rentals are *not* the subject of the sales taxes in issue in the case at bar.

IX. The Decisions of the Courts Below Do Not Conflict With the Sales Tax Decisions of this Court.

Banker Brothers Company v. *Pennsylvania*, 222 U. S. 210, involved the local sale of an automobile by a local dealer. The contract of sale was executed locally, the purchase price was received locally and delivery was local. This Court distinguished the case of "a sale by the manufacturer at the factory" holding that "the contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price." All of the incidents of the transaction were local and constituted a local sale in Pennsylvania.

Wiloil Corporation v. *Pennsylvania*, 294 U. S. 169, involved a tax of 3 cents a gallon levied "upon all liquid fuels used or sold and delivered by distributors within the commonwealth." In that case the company, with its principal place of business in Pittsburgh, sold liquid fuels at wholesale and was a "distributor" as defined by the Act. The Philadelphia agent of the company ordered 13 tank cars for delivery to purchasers in Philadelphia and Essington, Pennsylvania. The order specified a price per gallon "f. o. b. Wilmington, Del., plus 3 cents tax" and was received at the company's office in Pittsburgh for approval. The company obtained the fuel at Wilmington and *on the order of the company* it was shipped by rail from there to the purchasers in Pennsylvania. This Court said that the commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State and held that an "interstate transportation was not required or contemplated." The sales contracts were made in Pennsylvania, the company was doing business in Pennsylvania and deliveries were made in Pennsylvania. Under such circumstances the whole transaction and all of its incidents were local and subject to tax.

X. The Decision of the Courts Below Do Not Conflict With the "Gross Receipts" Tax or "Personal Property" Tax Decisions of this Court.

Western Live Stock v. *Bureau*, 303 U. S. 250, involved a "privilege tax" measured by gross receipts from "business done" (advertising) locally within the State. This Court held that the tax was "an excise conditioned on the carrying on of a local business." (p. 257.) This Court emphasized the fact that the tax did "not embrace the purchase price of the articles shipped in interstate commerce" (pp. 258-259). Receipts from subscriptions to the magazine from without the State and the circulation of the magazine interstate were *not* included in the measure of the tax.

Adams Mfg. Co. v. Storen, 304 U. S. 307, involved the Indiana Gross Income Tax based upon "gross receipts derived from trades, businesses, or commerce." This Court held it was a "privilege tax" upon the receipt of gross income and since under the statute interstate commerce would be subjected to the "risk of a double tax burden" the tax was held to be a burden upon such commerce.

Minnesota v. *Blasius*, 290 U. S. 1, involved a personal property tax. Cattle shipped from another State were at rest in the St. Paul stockyards when purchased by the defendant. They were there being held at the pleasure of their owner, for disposal or use. This Court held that they had acquired a local "situs", and, being locally owned as part of the general mass of property within the State, the defendant was subject to the personal property tax on such ownership although he later sold and shipped them to another State.

XI. There is No Conflict in the State Court Decisions.

Petitioner suggests a conflict between the decision of the Supreme Court of Appeals of West Virginia in the case of *Lewis* v. *City of Bluefield*, 117 W. Va. 782, 188 S. E. 237, and the decision in the case at bar. There is no conflict in fact or law.

That West Virginia case involved an annual "license" tax for the local privilege of "doing business" (selling and delivering coal) based on the tonnage capacity of vehicles "locally" employed in that business. The Court expressly held that the tax was *not* "an excise upon the privilege of importation nor a tax upon that which is imported". (Page 789.)

Compare: *Kresge Co.* v. *City of Bluefield*, 117 W. Va. 17; and *Anderson-Newcomb* v. *Huntington*, 117 W. Va. 716, where a consumers "sales tax" was held invalid.

CONCLUSION.

No conflict of decisions exists. The decisions below are correct and in accord with the decisions of this Court. The petition should be denied.

Respectfully submitted,

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Attorney for Respondent.

May, 1939.

APPENDIX A.

Laws of New York Provisions of State Enabling Act.

Chapter 873.

Section 1. Notwithstanding any other provision of law to the contrary, any city of the State having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nineteen hundred thirty-five, or any portion of such period. *A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.* [Italics ours.]

* * *

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits. [Italics ours.]

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried

on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

APPENDIX B.

Local Laws of the City of New York.

Sales Tax.

For the Year 1934, No. 20 as amended by No. 24.

* * *

§1. Definitions. When used in this local law:

(a) The word "person" includes an individual, copartnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

* * *

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

* * *

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

* * *

§ 2. Imposition of tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon

the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

• • •

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and *receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax shall not be subject to tax hereunder.* [Italics ours]

• • •

Where a purchaser has failed to pay and a vender has failed to collect a tax upon a sale or service, as imposed by this local law, *then* in addition to all other rights, obligations and remedies provided, *such tax shall be payable by the purchaser directly to the comptroller* and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered. [Italics ours]

The *comptroller* may, wherever he deems it necessary for the proper enforcement of this local law, *provide* by regulation *that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed,* at such times as returns are required to be filed and payment over made by vendors. [Italics ours]

APPENDIX C.

New York City Personal Property Tax.

Sec. 1. Imposition of Tax. During the period commencing on January 1, 1935 and ending on December 31, 1935, there shall be paid by the owner a tax of 2 per centum upon the value of the following-named *articles of personal property situated or owned within the City of New York.*

• • • •

e. Machinery of every type and variety, including *typewriters and all other business machinery* • • •;

Sec. 2. Exemptions. No tax, as imposed by Section 1 of this title shall be due or payable in any event upon any of the articles enumerated in the said section 1, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the Comptroller.

• • • •

c. That the said article is one *upon the receipt from the sale of which a tax has been paid* pursuant to the provisions of this law or Local Law 20, of 1934, as amended. [The City "Sales Tax"] (Italics ours).

• • • •